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Warranties—Uniform Commercial Code—Effects of Federal Warranty Law on Washington U.C.C. Provisions—Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301-2312 (Supp. V. 1975)

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WARRANTIES—UNIFORM COMMERCIAL CODE—EFFECTS OF FEDERAL WARRANTY LAW ON WASHINGTON U.C.C. PROVISIONS—*Magnuson-Moss Warranty Act*, 15 U.S.C. §§ 2301–2312 (Supp. V 1975).

In recent months the warranty documents accompanying consumer products have begun to incorporate new terminology and describe new warranty procedures. These changes are the result of the first federal legislation in the consumer product warranty field—the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (Magnuson-Moss Warranty Act).¹ On December 31, 1976, the rules necessary for implementation of the Act became fully operative.²

Consumer product warranties—their creation, breach, and remedies upon breach—have generally been controlled by the common law and Uniform Commercial Code (U.C.C.) provisions in each state. Washington is no exception, and the Magnuson-Moss Warranty Act should have a significant impact upon the traditional warranty law of this jurisdiction. This note will briefly discuss the Act's basic requirements and then consider the impact of several of the Act's major provisions upon similar or conflicting provisions of the Washington Uniform Commercial Code.³ Primary emphasis will be placed upon the Act's effects regarding the doctrine of privity, disclaimer of implied warranties, limitation on remedies and consequential damages, and the creation of a federal cause of action for breach of warranty. Non-conflicting provisions of the Act which add significantly to Washington law will also be noted.

1. Pub. L. No. 93–637, 88 Stat. 2183 (1975). Title I, dealing with consumer product warranties, is codified at 15 U.S.C. §§ 2301–2312 (Supp. V 1975). Title II, dealing with the jurisdiction and powers of the Federal Trade Commission, is codified at 15 U.S.C. §§ 45–46, 49–50, 52, 56–57 (Supp. V 1975), and is not dealt with in this note.

2. The effective date of most of the Act was July 4, 1975. See Magnuson-Moss Warranty—Federal Trade Commission Improvement Act § 112(a), 15 U.S.C. § 2312(a) (Supp. V 1975) [hereinafter cited as Magnuson-Moss Warranty Act]. Section 112 became effective on December 31, 1976, one year after the final publication of implementation rules for that section. See *id.* § 112(b), 15 U.S.C. § 2312(b); Federal Trade Commission, *Rules, Regulations, Statements and Interpretations Under Magnuson-Moss Warranty Act*, 40 Fed. Reg. 60,167, 60,190 (1975) [hereinafter cited as *Magnuson-Moss Statements*]. The Federal Trade Commission has indicated that it intends the implementation rules made final on December 31, 1976 to apply only to products manufactured thereafter. See 41 Fed. Reg. 34,657 (1976)(proposing 16 C.F.R. § 700.12).

3. The scope of this note is limited to the effects of the Act on Washington warranty law. For further discussion of the Act, see Clark & Davis, *Beefing Up Product*

The note concludes that the Act is highly technical and not without ambiguities which will remain a source of frustration for both purchasers and sellers of consumer products. Nonetheless, it is hoped that recognition of the Act's interaction with state law will aid Washington citizens in fully utilizing its beneficial provisions.

I. THE ACT AND ITS UNDERLYING PROBLEMS

A. Basic Provisions

The Magnuson-Moss Warranty Act was promulgated in order to increase consumer understanding of product warranties and the rights accompanying such warranties, as well as to provide assurances that such rights could be enjoyed.⁴ Although the Act is primarily a warranty labeling and disclosure law, its provisions make substantive changes in state law regarding warranties, their disclaimer, and causes of action for breach of warranty. Additionally, the Act establishes the possibility of informal dispute settlement mechanisms for warranty problem solution.⁵

The Act provides that any "warrantor"⁶ who gives a "written war-

Warranties: A New Dimension in Consumer Protection, 23 KAN. L. REV. 567 (1975); Denicola, *The Magnuson-Moss Warranty Act: Making Consumer Product Warranty a Federal Case*, 44 FORDHAM L. REV. 273 (1975); Leete, *A Look at the Consumer Warranty Problem—The Federal Solution*, 6 U. TOL. L. REV. 35 (1975); Rothschild, *The Magnuson-Moss Warranty Act: Does It Balance Warrantor and Consumer Interests?* 44 GEO. WASH. L. REV. 335 (1976); Saxe & Blejwas, *The Federal Warranty Act: Progress and Pitfalls*, 22 N.Y.L. SCH. L. REV. 1 (1976); Schmitt & Kovac, *Magnuson-Moss vs. State Protective Consumer Legislation: The Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21 (1976); Shaw, *Magnuson-Moss Warranty—Federal Trade Commission Improvement Act*, 17 S. TEX. L.J. 229 (1976); Squillante, *The New Federal Warranty Disclosure Standards for Written Warranties of Consumer Products* (pts. 1-3), 80 COM. L.J. 477, 516, 81 COM. L.J. 54 (1975-76); Strasser, *Magnuson-Moss Warranty Act: An Overview and Comparison with UCC Coverage, Disclaimer, and Remedies in Consumer Warranties*, 27 MERCER L. REV. 1111 (1976); 51 IND. L.J. 397 (1976); 9 J. MAR. J. PRAC. & PROC. 887 (1976); 51 NOTRE DAME LAW. 775 (1976); 7 RUT.-CAM. L.J. 379 (1976); 49 TEMP. L.Q. 459 (1976); 33 WASH. & LEE L. REV. 163 (1976).

4. 120 CONG. REC. S21,976 (daily ed. Dec. 18, 1974) (remarks of Sen. Moss).

5. Magnuson-Moss Warranty Act § 110(a), 15 U.S.C. § 2310(a) (Supp. V 1975); 16 C.F.R. § 703 (1976). Discussion of the dispute settlement mechanisms is beyond the scope of this note. See Rothschild, *supra* note 3, at 368-77, and other sources cited note 3 *supra*.

6. The Act defines "warrantor" as "any supplier or other person who gives or offers to give a written warranty or who is or may be obligated under an implied warranty." Magnuson-Moss Warranty Act § 101(5), 15 U.S.C. § 2301(5) (Supp. V 1975). This definition was modified for certain purposes by the final implementing rules under the Act. See note 60 *infra*.

ranty”⁷ must include certain information as outlined in the Act⁸ and specifically prescribed by the rules promulgated thereunder.⁹ The Act

7. Magnuson-Moss Warranty Act § 101(6), 15 U.S.C. § 2301(6) (Supp. V 1975) provides:

The term “written warranty” means—

(A) any written affirmation of fact or written promise made in connection with the sale of a consumer product by a supplier to a buyer which relates to the nature of the material or workmanship and affirms or promises that such material or workmanship is defect free or will meet a specified level of performance over a specified period of time, or

(B) any undertaking in writing in connection with the sale by a supplier of a consumer product to refund, repair, replace, or take other remedial action with respect to such product in the event that such product fails to meet the specifications set forth in the undertaking, which written affirmation, promise, or undertaking becomes part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product.

8. *Id.* § 102(a), 15 U.S.C. § 2302(a) provides:

(a) In order to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products, any warrantor warranting a consumer product to a consumer by means of a written¹ warranty shall, to the extent required by rules of the Commission, fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty. Such rules may require inclusion in the written warranty of any of the following items among others:

(1) The clear identification of the names and addresses of the warrantors.

(2) The identity of the party or parties to whom the warranty is extended.

(3) The products or parts covered.

(4) A statement of what the warrantor will do in the event of a defect, malfunction, or failure to conform with such written warranty—at whose expense—and for what period of time.

(5) A statement of what the consumer must do and expenses he must bear.

(6) Exceptions and exclusions from the terms of the warranty.

(7) The step-by-step procedure which the consumer should take in order to obtain performance of any obligation under the warranty, including the identification of any person or class of persons authorized to perform the obligations set forth in the warranty.

(8) Information respecting the availability of any informal dispute settlement procedure offered by the warrantor and a recital, where the warranty so provides, that the purchaser may be required to resort to such procedure before pursuing any legal remedies in the courts.

(9) A brief, general description of the legal remedies available to the consumer.

(10) The time at which the warrantor will perform any obligations under the warranty.

(11) The period of time within which, after notice of a defect, malfunction, or failure to conform with the warranty, the warrantor will perform any obligations under the warranty.

(12) The characteristics or properties of the products, or parts thereof, that are not covered by the warranty.

(13) The elements of the warranty in words or phrases which would not mislead a reasonable, average consumer as to the nature or scope of the warranty.

9. The implementing rule varied the Act’s requirements:

(a) Any warrantor warranting to a consumer by means of a written warranty a consumer product actually costing the consumer more than \$15.00 shall clearly

does not *require*, however, that written warranties be given with consumer products.¹⁰

and conspicuously disclose in a single document in simple and readily understood language, the following items of information: (1) The identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty;

(2) A clear description and identification of products, or parts, or characteristics or components or properties covered by and where necessary for clarification, excluded from the warranty;

(3) A statement of what the warrantor will do in the event of a defect, malfunction or failure to conform with the written warranty, including the items or services the warrantor will pay for or provide, and where necessary for clarification, those which the warrantor will not pay for or provide;

(4) The point in time or event on which the warranty term commences, if different from the purchase date, and the time period or other measurement of warranty duration;

(5) A step-by-step explanation of the procedure which the consumer should follow in order to obtain performance of any warranty obligation, including the persons or class of persons authorized to perform warranty obligations. This includes the name(s) of the warrantor(s), together with: the mailing address(es) of the warrantor(s), and/or the name or title and the address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number which consumers may use without charge to obtain information on warranty performance;

(6) Information respecting the availability of any informal dispute settlement mechanism elected by the warrantor in compliance with Part 703 of this subchapter;

(7) Any limitations on the duration of implied warranties, disclosed on the face of the warranty as provided in Section 108 of the Act, accompanied by the following statement:

Some states do not allow limitations on how long an implied warranty lasts, so the above limitation may not apply to you.

(8) Any exclusions of or limitations on relief such as incidental or consequential damages accompanied by the following statement, which may be combined with the statement required in sub-paragraph (7) above:

Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you.

(9) A statement in the following language:

This warranty gives you specific legal rights, and you may also have other rights which vary from state to state.

(b) Paragraph (a)(1)—(9) of this Section shall not be applicable with respect to statements of general policy on emblems, seals or insignias issued by third parties promising replacement or refund if a consumer product is defective, which statements contain no representation or assurance of the quality or performance characteristics of the product; provided that (1) the disclosures required by paragraph (a)(1)—(9) are published by such third parties in each issue of a publication with a general circulation, and (2) such disclosures are provided free of charge to any consumer upon written request.

16 C.F.R. § 701.3 (1976).

10. The Act states: "Nothing in this title (other than paragraph (3) of this subsection) shall be deemed to authorize the Commission to prescribe the duration of written warranties given or to require that a consumer product or any of its components be warranted." Magnuson-Moss Warranty Act § 102(b)(2), 15 U.S.C. § 2302(b)(2) (Supp. V 1975).

"Consumer product" is defined by the Act as "any tangible personal property which

B. Designation of Warranties

The designation-of-warranty provisions are the requirements of the Act that will be most apparent to consumers. Every written warranty of a consumer product costing more than ten dollars must "clearly and conspicuously" designate whether it is "full" or "limited."¹¹ The respective categories provide different degrees of warranty information to consumers and differ in their impact on state law.

A "full" warranty is one which meets criteria termed "Federal minimum standards for warranty."¹² In addition to the general disclosure requirements of the Act,¹³ the federal minimum standards require, *inter alia*, that a "full" warrantor must, as a minimum, "remedy" a defective product within a reasonable time and without charge.¹⁴ Such a "full" warranty cannot impose any limitation on the duration of an

is distributed in commerce and which is normally used for personal, family, or household purposes (including any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed)." *Id.* § 101(1), 15 U.S.C. § 2301(1). The definition of the term in two of the implementing rules adds the following: "[p]roducts which are purchased solely for commercial or industrial use are excluded solely for purposes of this Part." 16 C.F.R. §§ 701.1(b), 702.1(b) (1976). A proposed implementation rule of the Federal Trade Commission explains the scope of the term in detail. See 41 Fed. Reg. 34,654-55 (1976) (proposing 16 C.F.R. § 700.1).

11. The Act provides:

(a) Any warrantor warranting a consumer product by means of a written warranty shall clearly and conspicuously designate such warranty in the following manner, unless exempted from doing so by the Commission pursuant to subsection (c) of this section:

(1) If the written warranty meets the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "full (statement of duration) warranty."

(2) If the written warranty does not meet the Federal minimum standards for warranty set forth in section 104 of this Act, then it shall be conspicuously designated a "limited warranty."

(b) Sections 102, 103, and 104 shall not apply to statements or representations which are similar to expressions of general policy concerning customer satisfaction and which are not subject to any specific limitations.

(c) In addition to exercising the authority pertaining to disclosure granted in section 102 of this Act, the Commission may by rule determine when a written warranty does not have to be designated either "full (statement of duration)" or "limited" in accordance with this section.

(d) The provisions of subsections (a) and (c) of this section apply only to warranties which pertain to consumer products actually costing the consumer more than \$10 and which are not designated "full (statement of duration) warranties."

Magnuson-Moss Warranty Act § 103, 15 U.S.C. § 2303 (Supp. V 1975).

12. *Id.* § 104, 15 U.S.C. § 2304.

13. See *id.* § 102, 15 U.S.C. § 2302; 16 C.F.R. § 701.3 (1976), quoted at note 9 *supra*.

14. Magnuson-Moss Warranty Act § 104(a)(1), 15 U.S.C. § 2304(a)(1) (Supp. V 1975). "Remedy" is defined by the Act as follows:

implied warranty,¹⁵ nor can it impose any duty on the consumer (other than that of notifying the warrantor of a defect) without prior demonstration to the Federal Trade Commission that the duty is reasonable.¹⁶ In addition, a "full" warranty cannot exclude or limit consequential damages without conspicuously disclosing that fact on the face of the warranty.¹⁷ The "full" warranty provisions also provide that the duties extend to each person who is a consumer with regard to the warranted product.¹⁸ In contrast, a "limited" warranty is any written warranty that does not meet the federal minimum standards;¹⁹ nevertheless it remains subject to the provisions of the Act and its implementing rules.

C. Implementation Rules

The Act relies extensively on rules promulgated by the Federal Trade Commission for its implementation. References to these rules, most of which the Commission is not required to promulgate, appear at various places in the Act and pertain to a variety of warranty matters.²⁰ For persons utilizing the Magnuson-Moss Warranty Act, the rules are as important as the statute itself; they provide the specific

The term "remedy" means whichever of the following actions the warrantor elects:

- (A) repair.
- (B) replacement, or
- (C) refund;

except that the warrantor may not elect refund unless (i) the warrantor is unable to provide replacement and repair is not commercially practicable or cannot be timely made, or (ii) the consumer is willing to accept such refund.

Id. § 101(10), 15 U.S.C. § 2301(10). The definition in the implementing rule is effectively identical. *See* 16 C.F.R. § 701.1(e) (1976).

15. Magnuson-Moss Warranty Act § 104(a)(2), 15 U.S.C. § 2304(a)(2) (Supp. V 1975). Such a durational limitation is otherwise allowed in the case of "limited" warranties under § 108(b). *See* note 83 and accompanying text *infra*.

16. Magnuson-Moss Warranty Act § 104(b)(1), 15 U.S.C. § 2304(b)(1) (Supp. V 1975).

17. *Id.* § 104(a)(3), 15 U.S.C. § 2304(a)(3).

18. *Id.* § 104(b)(4), 15 U.S.C. § 2304(b)(4).

19. *Id.* § 103(a)(2), 15 U.S.C. § 2303(a)(2), *quoted at* note 11 *supra*.

20. The following provisions of the Act are "optional" in that they do not require the Federal Trade Commission (FTC) to promulgate implementing rules: Magnuson-Moss Warranty Act § 101(12), 15 U.S.C. § 2301(12) (Supp. V 1975) (use of depreciation in determining refunds), *but see* 41 Fed. Reg. 22,099 (1976) (proposing 16 C.F.R. § 704); Magnuson-Moss Warranty Act § 102(b)(1)(B), 15 U.S.C. § 2302(b)(1)(B) (Supp. V 1975) (manner of warranty display); *id.* § 102(b)(3), 15 U.S.C. § 2302(b)(3) (extension of warranty period by failure to repair); *id.* § 102(d), 15 U.S.C. § 2302(d) (standard provisions for incorporation by reference); *id.* § 103, 15 U.S.C. § 2303 (exemption from "full" or "limited" designation requirement); *id.*

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warranty requirements,²¹ establish remedies,²² and even change some substantive provisions of the Act.²³ Although the rules are the main source of information for implementation of the Act, they are also a source of confusion due to inconsistencies with statutory language and inconsistencies within the rules themselves.²⁴

D. The Effects of the Act on State Law

A significant problem with the Act is the degree to which it precludes state law.²⁵ The Act does not specifically mention preemption

§ 104(a)(4), 15 U.S.C. § 2304(a)(4) (determining what constitutes a reasonable number of repair attempts); *id.* § 104(b)(2), 15 U.S.C. § 2304(b)(2) (exemption to requirement that products be returned clear of liens); *id.* § 104(b)(3), 15 U.S.C. § 2304(b)(3) (detailed duties of "full" warrantor); *id.* § 106(a), 15 U.S.C. § 2306(a) (service contract conditions).

The following provisions require promulgation on the part of the FTC: *id.* § 102(a), 15 U.S.C. § 2302(a) (written warranty provisions), *see* 16 C.F.R. § 701 (1976); Magnuson-Moss Warranty Act § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (Supp. V 1975) (pre-sale availability of warranty provisions), *see* 16 C.F.R. § 702 (1976); Magnuson-Moss Warranty Act § 109(b), 15 U.S.C. § 2309(b)(Supp. V 1975) (used automobile warranties), *see* 41 Fed. Reg. 1089, 20,896 (1976) (proposing 16 C.F.R. § 455); Magnuson-Moss Warranty Act § 110(a)(2), 15 U.S.C. § 2310(a)(2)(Supp. V 1975) (informal dispute settlement mechanisms), *see* 16 C.F.R. § 703 (1976).

21. 16 C.F.R. § 701 (1976).

22. *Id.* § 703.

23. Certain of the implementing rules greatly alter the Act. For example, section 102(e) of the Act provides that the labeling provisions of that section apply only to products costing more than \$5. In contrast, rules in 16 C.F.R. §§ 701.2, 702.3 (1976) provide that the labeling provisions shall apply only to products costing more than \$15. The question of authority to make this change apparently bothered the Federal Trade Commission, which used four columns of its explanatory statement to justify the change. *See Magnuson-Moss Statements, supra* note 2, at 60,171-72 (1975).

24. In circumstances to which the rules cited in note 23 *supra* apply, for example, the rules apparently do not affect the designation requirements of section 102 of the Act, with the result that a written warranty must be designated "full" or "limited" when the product costs more than \$10, but need not fulfill the warranty provisions of the Act and implementing rules unless the product costs more than \$15. This result is somewhat anomalous and not consistent with the original distinction of the Act: disclosure required on products more than \$5, labeling required on products costing more than \$10. Requiring a warrantor to label a product warranty with the Act's terms of art, yet not requiring disclosure of the warranty terms, does not seem to benefit consumers. Nevertheless, the implementing rule requires this result with respect to all products costing more than \$10 and less than \$15.01.

25. The preemption problems of the Act are discussed in Schmitt & Kovac, *Magnuson-Moss vs. State Protective Consumer Legislation: Validity of a Stricter State Standard of Warranty Protection*, 30 ARK. L. REV. 21 (1976). The authors conclude that preemption problems exist with respect to the labeling and disclosure provisions of the Act. They suggest that the FTC should act to review and validate, under the provisions of the Act, state consumer protection legislation more protective than that of the Act and thus, subject to preemption. *Id.* at 33. *See also* Comment, *Pre-emption as a Preferential Ground: A New Canon of Construction*, 12 STAN. L. REV. 208 (1959).

of state law, but it is clear from the hearings²⁶ and committee reports²⁷ that Congress was aware of that possibility.

With respect to the Uniform Commercial Code provisions allowing disclaimer of implied warranties, section 108 of the Act and its legislative history demonstrate congressional intent to supersede inconsistent state provisions.²⁸ In addition, section 111(c)²⁹ precludes state labeling or disclosure requirements that, if within the scope of the Act, are not identical to the requirements of the Act and do not have prior approval of the Federal Trade Commission. Unfortunately, confusion arises because section 111(b)(1) specifically preserves consumer rights

26. See *Consumer Products Warranties and Improvement Act of 1971: Hearings on S. 986 Before the Consumer Subcomm. of the Senate Comm. on Commerce*, 92d Cong., 1st Sess. 58 (1971) (memorandum of Federal Trade Commission) [hereinafter cited as *1971 Senate Hearings*]; *id.* at 115 (statement of George Lamb); *id.* at 136 (statement of J. Edward Day); *id.* at 174 (statement of Alan Weber); *id.* at 195 (discussion between Eugene A. Keeny and Senator Cook); *id.* at 204-05 (discussion between Eugene A. Keeny and staff counsel); *id.* at 243 (question asked by Senator Cook). See also *Consumer Warranty Protection: Hearings on H. R. 6313, H.R. 6314, H.R. 261, H.R. 4809, H.R. 5037, H.R. 10673 (and similar and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 92d Cong., 1st Sess. 128-29 (1971) (statement of Fairfax Leary, Jr.) [hereinafter cited as *1971 House Hearings*]; *id.* at 208-09 (statement of Miles W. Kirkpatrick); *Consumer Warranty Protection—1973: Hearings on H. R. 20 and H. R. 5021 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 93-94 (1973) (statement of Fairfax Leary, Jr.) [hereinafter cited as *1973 House Hearings*]; *id.* at 343 (statement submitted on behalf of Sears, Roebuck, & Co.). The statements and testimony at these proceedings indicated that preemption of state law was intended by the drafters.

27. See S. REP. NO. 151, 93d Cong., 1st Sess. 25 (1973); H.R. REP. NO. 1107, 93d Cong., 2d Sess. 43-44 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7725.

28. Magnuson-Moss Warranty Act § 108, 15 U.S.C. § 2308 (Supp. V 1975) provides:

(a) No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) For purposes of this title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law.

See 120 CONG. REC. S21,977 (daily ed. Dec. 18, 1974) (remarks of Sen. Magnuson); S. REP. NO. 151, 93d Cong., 1st Sess. 21 (1973); H. R. REP. NO. 1107, 93d Cong., 2d Sess. 40 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7721-22. Both the Senate and House reports specifically refer to preemption by the Act where state provisions differ from those of the Act.

29. Magnuson-Moss Warranty Act § 111(c), 15 U.S.C. § 2311(c) (Supp. V 1975) provides:

and remedies under state law.³⁰ Because the effect of this section is not clear, the preemption problem underlies much of the Act, and will thus be noted as it relates to specific provisions discussed in this note.

II. PRIVACY OF CONTRACT IN BREACH OF WARRANTY ACTIONS

The concept of privity of contract often provides a defense to a breach of warranty action, and is thus of importance when discussing the consumer product warranty area. Washington statutory and case law on privity is significantly affected by the privity provisions of the Magnuson-Moss Warranty Act.

A. Horizontal Privity

The privity between the seller and various individuals after sale to the original purchaser is known as horizontal privity. The lack of such privity may preclude the liability of the seller for breach of warranty to the remote user of a consumer product.³¹

(1) Except as provided in subsection (b) and in paragraph (2) of this subsection, a State requirement—

(A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 102, 103, and 104 (and rules implementing such sections), and

(C) which is not identical to a requirement of section 102, 103, or 104 (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

(2) If, upon application of an appropriate State agency, the Commission determines (pursuant to rules issued in accordance with section 100) that any requirements of such State covering any transaction to which this title applies (A) affords protection to consumers greater than the requirements of this title and (B) does not unduly burden interstate commerce, then such State requirement shall be applicable (notwithstanding the provisions of paragraph (1) of this subsection) to the extent specified in such determination for so long as the State administers and enforces effectively any such greater requirement.

30. *Id.* § 111(b)(1), 15 U.S.C. § 2311(b)(1) provides: "Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law." This provision would seem to be in conflict with Section 111(c), *quoted at* note 29 *supra*, because a state disclosure or labeling provision would give a consumer rights and remedies under state law. Although it is assumed that the legislation intends to maximize consumer protection, § 111(c) requires approval of the FTC to validate any state labeling or disclosure provision, even though such provision is more protective than the Magnuson-Moss Warranty Act. *See* notes 91-97 and accompanying text *infra*.

31. Horizontal privity questions arise when a transferee of the original consumer attempts to recover for breach of warranty against the retail seller. *See* [1976] 2 CON-

Washington has adopted the "narrow" version of three U.C.C. privity alternatives in R.C.W. § 62A.2-318,³² but many states have judicially or legislatively adopted more liberal alternatives.³³ Although the Washington court has recognized the continuing trend away from the privity requirement in warranty cases,³⁴ it has abandoned the requirement only where strict liability for personal injury may be invoked.³⁵ Whether horizontal privity is necessary in purely economic

SUMER PROTECTION: REPORTING SERVICE (Anderson) § 18.02(F)(7); E. PETERS, COMMERCIAL TRANSACTIONS 438 (1971); J. WHITE & R. SUMMERS, UNIFORM COMMERCIAL CODE § 11-2, at 327 (1972). See also *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 287 (Alas. 1976).

32. WASH. REV. CODE § 62A.2-318 (1976) provides:

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

The alternative provisions not adopted in Washington read:

Alternative B

A seller's warranty whether express or implied extends to any natural person who may reasonably be expected to use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Alternative C

A seller's warranty whether express or implied extends to any person who may reasonably be expected to use, consume or be affected by the goods and who is injured by breach of the warranty. A seller may not exclude or limit the operation of this section with respect to injury to the person of an individual to whom the warranty extends. (As amended 1966).

U.C.C. § 2-318.

The Washington provision (Alternative A) gives the narrowest coverage, extending warranties only to family, household or guests of the buyer.

The official comment to the U.C.C. takes a neutral position as to extending breach of warranty protection without privity beyond the "family" limits of the statute:

[Alternative A] expressly includes as beneficiaries within its provisions the family, household, and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.

U.C.C. § 2-318, Comment 3.

33. See Comment, *UCC Section 2-318: Effect on Washington Requirements of Privity in Products Liability Suits*, 42 WASH. L. REV. 253, 258-65 (1966). For a listing of various state approaches to the privity question, see 1A UNIFORM LAWS ANNOTATED 54-56 (master ed. 1976).

34. See *Brewer v. Oriard Powder Co.*, 66 Wn. 2d 187, 192, 401 P.2d 844, 847 (1965) (privity of contract not necessary in an action against the manufacturer of defective dynamite). The court called the privity problem the "Sargasso Sea of the law," *id.* at 190, 401 P.2d at 846, and stated that "a searching judicial review of the privity rule is in order." *Id.* at 193, 401 P.2d at 847. Such a review by the Washington court has yet to appear.

35. Washington has adopted strict liability and abandoned the requirement of privity in personal injury actions. See *Ulmer v. Ford Motor Co.*, 75 Wn. 2d 522, 452 P.2d 729 (1969); *Brown v. Quick Mix Co.*, 75 Wn. 2d 833, 454 P.2d 205 (1969).

loss-breach of warranty actions has not been determined in Washington.³⁶ It is therefore unknown whether the Washington court would: 1) follow the "consumer protection" stance that some courts have taken which does not allow lack of privity between the economically harmed party and the manufacturer or seller to bar recovery in breach of warranty,³⁷ or 2) follow an approach more consistent with a literal interpretation of R.C.W. § 62A.2-318 which would bar economic loss recovery when privity is lacking.³⁸

One effect of the Magnuson-Moss Warranty Act will be to clarify privity requirements in economic loss-breach of warranty situations involving consumer products. The provisions of the Act and rules thereunder directly address the horizontal privity question. The definition of "consumer," under both the Act³⁹ and the implementing rule,⁴⁰ includes the buyer of any consumer product *and* any person to whom

36. See generally 24 BAYLOR L. REV. 370 (1972) (Texas law).

37. See, e.g., *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (privity not required as matter of public policy in an action against manufacturer for defective carpeting); *Picker X-Ray Corp. v. General Motors Corp.*, 185 A.2d 919 (D.C. Ct. App. 1962) (privity not required because of policy of protecting consumers from physical or pecuniary injury in an action for breach of implied warranty on new automobile); *Fashion Novelty Corp. of N. J. v. Cocker Machine & Foundry Co.*, 331 F. Supp. 960 (D.N.J. 1971) (no privity of contract required for recovery of economic loss in an action involving defective machinery); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279 (Alas. 1976) (privity not required as a matter of public policy protecting consumers in an action for breach of implied warranties of merchantability and fitness for particular purpose). The *Morrow* decision contains an excellent discussion of the economic loss-privity issue.

38. See, e.g., *Koellmer v. Chrysler Motors Corp.*, 6 Conn. Cir. Ct. 478, 276 A.2d 807 (1970) (privity required for breach of warranty recovery against truck manufacturer); *Necktas v. General Motors Corp.*, 357 Mass. 546, 259 N.E.2d 234 (1970) (property damage recovery denied where no privity of contract between purchaser and manufacturer of defective automobile); *Hupp Corp. v. Metered Washer Serv.*, 256 Ore. 245, 472 P.2d 816 (1970) (buyer of clothes dryer parts could not recover economic loss for breach of warranty from manufacturer because no privity of contract); *Price v. Gatlin*, 241 Ore. 315, 405 P.2d 502 (1965) (purchaser of allegedly defective tractor not allowed breach of warranty recovery against wholesaler because of lack of privity); *Thermal Supply of Tex., Inc. v. Asel*, 468 S.W.2d 927 (Tex. Civ. App. 1971) (privity of contract required for breach of warranty action to recover economic loss of allegedly defective air conditioning compressor). See also Annot., 16 A.L.R.3d 683 (1967).

39. Magnuson-Moss Warranty Act § 101(3), 15 U.S.C. § 2301(3) (Supp. V 1975) provides:

The term "consumer" means a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract).

40. The definition of "consumer" in the implementing rule is essentially the same as that of the Act. 16 C.F.R. § 701.1(h) (1976).

such product is "transferred"⁴¹ during the duration of a written or implied warranty.

In the "full" warranty situation,⁴² the Act requires that "full" warranty obligations extend to each person who is a "consumer" with respect to the consumer product.⁴³ Thus, the original purchaser or any person to whom the product is "transferred" is entitled to warranty protection where the product carries a "full" warranty.⁴⁴ "Full" warranty status thus obviates the problem of horizontal privity in consumer product actions under the Act.

As to whether coverage exists in "limited" warranty situations regardless of the existence of privity, the Act is ambiguous. The final version of the Act seems to verify concerns expressed in early hearings that the language in the definition of "consumer" permits a "limited" warrantor to utilize the doctrine of privity.⁴⁵ But the fact that the Act affirmatively includes warranty protection despite lack of privity if a product is "fully" warranted⁴⁶ implies that a "limited" warranty is not required to include warranty coverage where privity is lacking. Determining who can enforce a "limited" warranty is made even more difficult by language in the Act and implementing rule covering specific warranty disclosures. The Act states that the rule may require inclu-

41. See note 44 *infra*.

42. See notes 12-18 and accompanying text *supra*.

43. Magnuson-Moss Warranty Act § 104(b)(4), 15 U.S.C. § 2304(b)(4) (Supp. V 1975).

44. Neither the Act nor the implementing rules discuss the term "transferred." It is assumed that the term refers to transfer of physical possession and is not limited to transfer of legal title. See note 49 *infra*. See also 41 Fed. Reg. 34,655-56 (1976) (proposing 16 C.F.R. § 700.6). The proposed rule states that a "full" warranty may not expressly restrict the warranty rights of a transferee during its stated duration, but that a warrantor would not be precluded from making the duration of the "full" warranty equal to the period of the first purchaser's ownership. For example, the warranty for an automobile muffler might be phrased "full warranty for as long as you own your car." *Id.* at 34,656. This is apparently the only situation where a transferee of a "fully" warranted consumer product would not receive warranty coverage.

45. The definition of "consumer" reads in part: "any other person who is entitled by the terms of such warranty . . . to enforce against the warrantor . . . the obligations of the warranty." Magnuson-Moss Warranty Act § 101(3), 15 U.S.C. § 2301(3) (Supp. V 1975) (emphasis added). The implication of this language is that the warrantor can require privity in some circumstances. Allowing the lack of privity of contract to defeat an action for breach of warranty was seen in early hearings as incongruous with the Act's purposes. See 1973 House Hearings, *supra* note 26, at 103 (statement of Fairfax Leary, Jr.).

The definition of "consumer" in the Act also fails to comport with the statement of a Senate report: "The intent of the definition [of consumer] is to make clear that the supplier is not entitled to specify which classes of people may enforce the obligations of the warranty These obligations extend to at least the first purchaser and any subsequent transferee" S. REP. NO. 151, 93d Cong., 1st Sess. 12 (1973).

46. See note 43 and accompanying text *supra*.

sion in the warranty of "[t]he identity of the party or parties to whom the warranty is extended."⁴⁷ The implementing rule requires disclosure when limiting enforceability to the original consumer purchaser and to persons "other than every consumer owner during the term of the warranty."⁴⁸ The Act, the implementing rules, and the explanations accompanying the rules unfortunately do not explain the term "consumer owner."⁴⁹ Although the language of the Act and underlying rules is most confusing as to who is entitled to protection in the "limited" warranty situation, it is apparent from the language of the implementing rule that the Commission intends that the doctrine of privity can be relevant to at least some parties vis-a-vis the warrantor.⁵⁰

The effect of the Act on Washington's horizontal privity provision is thus twofold. For a consumer product carrying a "full" warranty under the Act, the provisions of R.C.W. § 62A.2-318 are expanded to provide warranty coverage beyond the "family and guest" to every consumer of the product despite lack of privity. The Act brings signif-

47. Magnuson-Moss Warranty Act § 102(a)(2), 15 U.S.C. § 2302(a)(2) (Supp. V 1975). Note that although this disclosure section applies to both "full" and "limited" warranties, the "full" warranty provisions render this provision inapplicable in the "full" warranty context. See notes 43-44 and accompanying text *supra*.

48. 16 C.F.R. § 701.3(a)(1) (1976) reads: "[The warranty shall disclose] [t]he identity of the party or parties to whom the written warranty is extended, if the enforceability of the written warranty is limited to the original consumer purchaser or is otherwise limited to persons other than every consumer owner during the term of the warranty." *Id.* (emphasis added). The proposed rule provided for disclosure of "[t]he identity of the party or parties to whom the warranty is extended, including where applicable, any limitation on its enforceability by any party other than the first purchaser at retail." 40 Fed. Reg. 29,893 (1975) (proposing 16 C.F.R. § 701.3(b)). Had the proposed language become final, it would be clear that a warrantor could limit enforceability and in effect require privity of contract between consumer and warrantor in the limited warranty context.

49. This could mean that the FTC is interpreting the term "transferred" to refer to change of ownership and not mere possession, but such an interpretation seems inherently inconsistent with the definition of "consumer," see note 39 *supra*, and will have to be explained by the Commission or judicially interpreted. See also *Magnuson-Moss Statements*, *supra* note 2, at 60,172 where the FTC states that the final rule adopts an industry recommendation that disclosure be required only when the warranty does not extend to the original purchaser and all transferees during the warranty period. Since the final rule uses the term "every consumer owner" instead of "transferees," it would seem that the Commission is equating the two terms. See 16 C.F.R. § 701.3(a) (1976).

50. The Washington statute gives non-privity of contract warranty protection to the "family." See note 32 *supra*. The question might be raised whether the Act would permit a warrantor to reinstate the doctrine of privity against those persons apparently protected by the Washington provision. The answer should be that the Act's preservation of consumers' rights and remedies protects the "family" provision in the Washington statute. Cf. Magnuson-Moss Warranty Act § 111(b)(1), 15 U.S.C. § 2311(b)(1) (Supp. V 1975), quoted at note 30 *supra*.

icant change to the Washington provision, and warrantors should be aware that when they give "full" written warranties and thus comply with the federal minimum standards for warranty,⁵¹ they cannot hide behind the defense of a lack of privity. The "limited" warranty product appears to fall under the traditional state provisions. The "limited" warrantor can restrict the enforceability of the warranty to the original consumer purchaser, subject of course to the state U.C.C. provisions.⁵²

B. Vertical Privity

Another aspect of Washington law affected by the Magnuson-Moss Warranty Act involves "vertical privity"—so named because it concerns the liability of remote sellers, manufacturers, distributors, and others up and down the chain of distribution.⁵³ Washington's privity statute mentions only "seller," and the official comments to the section speak only to the question of horizontal privity.⁵⁴ While the Washington court has endorsed liability for parties other than retail sellers in personal injury actions,⁵⁵ it has not determined the liability of remote sellers or manufacturers in economic loss situations since the enactment of R.C.W. § 62A.2-318.⁵⁶ Courts in other jurisdictions have distinguished between express and implied warranties, allowing recovery of economic losses without vertical privity in the former⁵⁷ while disallowing it in the latter.⁵⁸

51. Magnuson-Moss Warranty Act § 104, 15 U.S.C. § 2304 (Supp. V 1975).

52. See notes 32-36 and accompanying text *supra*.

53. Where a consumer purchaser sues the remote manufacturer or supplier with whom he or she has had no contact, the issue of vertical privity arises. See sources cited note 31 *supra*.

54. See note 32 *supra*.

55. See, e.g., *Nelson v. West Coast Dairy Co.*, 5 Wn. 2d 284, 105 P.2d 76 (1940) (implied warranty of fitness for food).

56. Prior to the enactment of WASH. REV. CODE § 62A.2-318, the Washington court had recognized that lack of vertical privity would bar a breach of warranty action in economic loss situations. In *Dimff v. Ernie Majer, Inc.*, 55 Wn. 2d 385, 347 P.2d 1056 (1960), the court held that where there was no privity, no warranty existed absent negligence, fraud, or a dangerous instrumentality. *Accord*, *Wise v. Hayes*, 58 Wn. 2d 106, 361 P.2d 171 (1961); *Kasey v. Suburban Gas Heat*, 60 Wn. 2d 468, 374 P.2d 549 (1962). *But see* *Nakanishi v. Foster*, 64 Wn. 2d 647, 393 P.2d 635 (1964) (privity requirement apparently replaced with a standard of reasonable care).

57. See, e.g., *Randy Knitwear, Inc. v. American Cyanamid Co.*, 11 N.Y.2d 5, 181 N.E.2d 399, 226 N.Y.S.2d 363 (1962) (resin maker's express warranty of nonshrinkage to material manufacturer enforceable by garment manufacturer having no privity with the resin maker); *Hawkins Constr. Co. v. Mathews*, 190 Neb. 546, 209 N.W.2d 643 (1973) (express warranty through advertising enforceable by one not in privity with manufacturer of scaffolding equipment).

58. See, e.g., *State ex rel. W. Seed Prod. Corp. v. Campbell*, 250 Ore. 262, 442

Section 110(f) of the Magnuson-Moss Act establishes a cause of action only against the warrantor *actually making* a written warranty.⁵⁹ The definition of "warrantor" in the final implementing rules is "any supplier or other person who gives or offers to give a written warranty."⁶⁰ "Supplier" is defined as "any person engaged in the business of making a consumer product directly or indirectly available to consumers."⁶¹ Thus, the Act *seems* to meet potential vertical privity problems directly, giving the consumer a cause of action against anyone in the distribution chain who gives or offers to give a written warranty. As to whom the warranty must be given, however, the Act is unclear. If a component manufacturer warrants the component to a product assembler, does the ultimate consumer of the product receive the right to enforce that component warranty? The proposed implementing rule answers in the negative unless the warranty is a basis of the bargain between seller and consumer.⁶² Thus with the exception

P.2d 215 (1968), *cert. denied*, 393 U.S. 1093 (1969) (privity of contract required in action for economic loss against producer of defective seed).

59. The section provides: "For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person." Magnuson-Moss Warranty Act § 110(f), 15 U.S.C. § 2310(f) (Supp. V 1975).

60. 16 C.F.R. § 701.1(g) (1976). Both the Act and the proposed warranty rule provided that "warrantor" included one who was liable under an implied warranty arising under state law. *See* Magnuson-Moss Warranty Act § 101(5), 15 U.S.C. § 2301(5) (Supp. V 1975); 40 Fed. Reg. 29,894 (1975) (proposing 16 C.F.R. § 702.1(d)). The FTC deleted the implied warranty language in the final disclosure rules, finding it too broad for a provision dealing only with written warranty disclosures. *See Magnuson-Moss Statements*, *supra* note 2, at 60,170.

Thus, for purposes of a suit for failing to disclose warranty information in accordance with the Act, a person liable under implied but not written warranties would not be liable for failure to *disclose* under the Act. This should not be confused with the ability to sue an implied warrantor for breach of warranty under the Act. *See* Part VI *infra*.

61. Magnuson-Moss Warranty Act § 101(4), 15 U.S.C. § 2301(4) (Supp. V 1975); 16 C.F.R. §§ 701.1(f), 702.1(f) (1976). The proposed rule also explained that "supplier" meant sellers, manufacturers, wholesalers, distributors, jobbers, and any other parts of the distribution system. *See* 40 Fed. Reg. 29,894 (1975) (proposing 16 C.F.R. § 702.1(g)). This language, however, was deleted from the final implementing rule.

62. 41 Fed. Reg. 34,655 (1976) (proposing 16 C.F.R. § 700.3(d)) provides:

The Magnuson-Moss Warranty Act generally applies to written warranties covering consumer products. Many consumer products are covered by warranties which are neither intended for, nor enforceable by, consumers. A common example is a warranty given by a component supplier to a manufacturer of consumer products. (The manufacturer may, in turn, warrant these components to consumers.) The component supplier's warranty is generally given solely to the product manufacturer, and is neither intended to be conveyed to the consumer nor brought to the consumer's attention in connection with a sale. Such warranties are not subject to the Act, since a written warranty under Section 101(6) of the Act must become "part of the basis of the bargain between a supplier and a buyer for purposes other than resale." However the Act applies to a component supplier's war-

of warranties given to assemblers and the like which are not intended to be communicated to consumers, manufacturers will be liable to consumers on written warranties despite a lack of privity between the parties.

A related issue which is not addressed by the Washington U.C.C. provisions involves the possibility of the dealer's liability on a manufacturer's express warranty where the dealer itself has made no warranty. In *Cochran v. McDonald*⁶³ the Washington court held that such liability turns on whether the seller has "adopted" the manufacturer's warranty.⁶⁴ The *Cochran* decision apparently still represents the Washington position, with the result that a retail dealer must take some sort of affirmative action in order to be liable upon the manufacturer's warranty.

The Magnuson-Moss Warranty Act appears to uphold the requirement of adoption, as well as to specify how it will take place. Under section 110(f)⁶⁵ a dealer would seemingly be unable to adopt a manufacturer's warranty by any act less than a written affirmation; however, the conference report⁶⁶ and proposed rules⁶⁷ contradict the

ranty in writing which is given to the consumer. An example is a supplier's written warranty to the consumer covering a refrigerator that is sold installed in a boat or recreational vehicle. The supplier of the refrigerator relies on the boat or vehicle assembler to convey the written agreement to the consumer. In this case, the supplier's written warranty is to a consumer, and is covered by the Act.

The rule also points out that the definition of written warranty under section 101(6) of the Act, *quoted at note 7 supra*, requires that such a warranty must be part of the basis of the bargain between a supplier and a buyer for purposes other than resale.

63. 23 Wn. 2d 348, 161 P.2d 305 (1945).

64. The *Cochran* case involved an action against a seller by a purchaser of defective antifreeze, based upon the manufacturer's express warranty. The court did not explicitly define what type of conduct by a seller on resale constitutes an adoption, but did hold that the mere fact of resale does not itself constitute an adoption. *Id.* at 351, 161 P.2d at 306. The court relied upon a leading Minnesota case, *Pemberton v. Dean*, 88 Minn. 60, 92 N.W. 478 (1902), and held that the antifreeze seller had merely sold the product and had not adopted the warranty. *See also* *Scovil v. Chilcoat*, 424 P.2d 87, 91 (Okla. 1967) (adoption of the manufacturer's warranty could be found where dealer made statement that an engine "would be guaranteed."); R. DUESENBERG & L. KING, SALES AND BULK TRANSFERS UNDER THE UNIFORM COMMERCIAL CODE § 6.08 [2] ([1966] 3 BENDER'S U.C.C. SERVICE).

65. Magnuson-Moss Warranty Act § 110(f), 15 U.S.C. § 2310(f) (Supp. V 1975), *quoted at note 59 supra*.

66. "The conferees intend that, if under State law a warrantor or other person is deemed to have made a written affirmation of fact, promise, or undertaking he would be treated for purposes of section 110 as having made such affirmation of fact, promise, or undertaking." S. REP. NO. 1408, 93d Cong., 2d Sess. 27 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7755, 7759.

67. A supplier who does no more than distribute or sell a consumer product covered by a written warranty offered by another person or business and which identifies that person or business as the warrantor is not liable for failure of the

"written only" language of the Act. Those sources indicate that dealer actions other than a writing can support liability under the original manufacturer's written warranty.⁶⁸ Consequently, although the Act appears to protect a retail dealer who does not give any sort of a writing, such may not be the case, and retailers must be concerned with not inadvertently adopting their suppliers' consumer product warranties.⁶⁹

Consumers and sellers should also note that the definition of "warrantor"⁷⁰ includes third parties who give warranties despite a lack of direct involvement in the manufacture or distribution of the consumer product. The definition thus brings a magazine's "seal of approval" within the ambit of the Act.⁷¹ For liability under such a "written warranty," however, such a third party warranty would have to be "part of the basis of the bargain between a supplier and a buyer. . . ."⁷²

written warranty to comply with the Act or rules thereunder. However, *other actions and written and oral representations* of such a supplier in connection with the offer or sale of a warranted product may obligate that supplier under the Act. Suppliers are advised to consult state law to determine those actions and representations which may make them co-warrantors, and therefore obligated under the warranty.

41 Fed. Reg. 34,655 (1976) (proposing 16 C.F.R. § 700.4) (emphasis added).

68. Thus, if a retail dealer in Washington has taken some action which constitutes an adoption under the rule of *Cochran v. McDonald*, 23 Wn. 2d 348, 161 P.2d 305 (1945), discussed at note 64 *supra*, such dealer could be liable under the Act having never executed a writing.

69. This interpretation of section 110(f) is consistent with the perceived purposes of the section by those testifying on the bill. See 1971 *House Hearings*, *supra* note 26, at 323 (testimony of George Lamb); 1971 *Senate Hearings*, *supra* note 26, at 125-27 (discussion between George Lamb and staff counsel); 1973 *House Hearings*, *supra* note 26, at 171-77 (testimony of Thomas Nichol, Jr.). These witnesses indicated that the purpose of the section was to protect manufacturers from inconsistent statements by dealers. That dealers are not necessarily protected from liability under manufacturer's warranties seems consistent. See also S. REP. NO. 151, 93d Cong., 1st Sess. 24 (1973), where the committee explains that such a provision [§ 110(f)] applies where the salesperson of a product warranted by the manufacturer for one year, gives a warranty on the product for five years. The drafters intended that only the salesperson could be sued on the five year warranty absent a demonstrated agency relationship.

70. Magnuson-Moss Warranty Act § 101(5), 15 U.S.C. § 2301(5) (Supp. V 1975), quoted at note 6 *supra*. See also 16 C.F.R. §§ 701.1(g), 702.1(d) (1976); S. REP. NO. 1408, 93d Cong., 2d Sess. 27 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7755, 7760.

71. Indeed the FTC added 16 C.F.R. § 701.3(b) (1976) in response to such "seal of approval" magazines. The provision exempts such magazines from fulfilling all the disclosure requirements on the product seal, allowing disclosure in the magazine instead. See *Magnuson-Moss Statements*, *supra* note 2, at 60,179 (1975). See also *Good Housekeeping*, January 1977, at 6.

72. See Magnuson-Moss Warranty Act § 101(6)(B), 15 U.S.C. § 2301(6)(B) (Supp. V 1975), quoted at note 7 *supra*; 16 C.F.R. §§ 701.1(c)(2), 702.1(c)(2) (1976).

III. DISCLAIMER AND MODIFICATION OF IMPLIED WARRANTIES

A. Disclaimer

Prior to 1974, Washington was one of the majority of jurisdictions retaining the provisions of the official version of the U.C.C. concerning disclaimer of implied warranties.⁷³ The statute provided that implied warranties could be disclaimed by mentioning merchantability and making the disclaimer conspicuous.⁷⁴

In 1971 the Washington Supreme Court in *Berg v. Stromme*⁷⁵ significantly altered the state's warranty law. The court noted that printed disclaimers were increasingly regarded with disfavor,⁷⁶ and held that waivers of the implied warranties of merchantability and

73. See generally 1A UNIFORM LAWS ANNOTATED 8-10 (master ed. 1976).

74. Prior to 1974 the Washington statute read:

SEC. 2-316. *Exclusion or Modification of Warranties.* (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

Uniform Commercial Code, Ch. 157, § 2-316 1965 Wash. Laws 1st Ex. Sess. 2333 (current version at WASH. REV. CODE § 62A.2-316 (1976)).

75. 79 Wn. 2d 184, 484 P.2d 380 (1971). In *Berg*, the plaintiff sued for breach of implied warranty when his new car turned out to be a "lemon." The court ruled for the plaintiff in spite of the fact that the printed sales contract form contained a disclaimer of implied warranties.

76. *Id.* at 187, 484 P.2d at 382.

fitness for a particular purpose were ineffectual unless explicitly negotiated between buyer and seller.⁷⁷

In 1974 the Washington Legislature responded to the *Berg v. Stromme* holding by amending the disclaimer of implied warranties provision to provide that in the case of goods purchased for personal, family, or household use, disclaimers of the implied warranties are effective only as to those qualities and characteristics particularly set forth as not being warranted.⁷⁸ Thus, a seller must specifically list the parts of a consumer product which are not being protected by the implied warranties. While placing an increased burden on sellers who wish to disclaim implied warranties, the Washington provision still allows such action if the seller takes the proper steps.

Both the *Berg* decision and the subsequent statutory change indicated a recognition on the part of the Washington court and legislature of the need for protecting consumers from disclaimers of implied warranties. The specific practice of offering an express warranty while disclaiming the implied warranties was of concern throughout the history of the Magnuson-Moss Warranty Act.⁷⁹ This concern led to the conclusion that implied warranties should not be disclaimed and resulted in what is the Act's most significant impact on Washington warranty law: section 108 of the Act provides that no supplier may dis-

77. "Waivers of such warranties, being disfavored in law, are ineffectual unless explicitly negotiated between buyer and seller and set forth with particularity showing the particular qualities and characteristics of fitness which are being waived." *Id.* at 196, 484 P.2d at 386. See also *Dobias v. Western Farmers Ass'n*, 6 Wash. App. 194, 491 P.2d 1346 (1971).

78. WASH. REV. CODE § 62A.2-316(4) (1976) reads:

Notwithstanding the provisions of subsections (2) and (3) of this section and the provisions of RCW 62A.2-719, as now or hereafter amended, in any case where goods are purchased primarily for personal, family or household use and not for commercial or business use, disclaimers of the warranty of merchantability or fitness for particular purpose shall not be effective to limit the liability of merchant sellers except insofar as the disclaimer sets forth with particularity the qualities and characteristics which are not being warranted. Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (RCW 62A.2-718 and RCW 62A.2-719).

The earlier version lacked the provision requiring specification of qualities or characteristics not warranted. See note 74 *supra*.

79. See 120 CONG. REC. S21,977 (daily ed. Dec. 18, 1974) (remarks of Sen. Magnuson); 1971 *House Hearings*, *supra* note 26, at 309-12; 1971 *Senate Hearings*, *supra* note 26, at 45; H.R. REP. NO. 1107, 93d Cong., 2d Sess. 27-28 (1974); S. REP. NO. 151, 93d Cong., 1st Sess. 7, 21 (1973). These materials note the widespread practice of giving an express warranty which appeared to have substantial value yet did not, and simultaneously disclaiming the implied warranties.

claim any implied warranty if a written warranty is given,⁸⁰ and that any attempt to disclaim implied warranties in a written warranty is ineffective for purposes of the Act and state law.⁸¹ The statute thus goes much beyond the protective provisions of R.C.W. § 62A.2-316, and it specifically precludes their applicability whenever "consumer products"⁸² are covered by written warranties.

B. Modification

What the left hand of the Magnuson-Moss Warranty Act giveth to consumers regarding the prohibition of disclaimers, the right hand may well taketh away by section 108(b)⁸³ which allows "limited" warrantors to restrict the *duration* of implied warranties. Under the U.C.C. implied warranty provisions, the concept of reasonableness has governed the length of time an implied warranty exists.⁸⁴ Under the final version of the Act,⁸⁵ however, the implied warranties may be limited to the duration of "a written warranty of reasonable duration"⁸⁶ if certain criteria are met.⁸⁷ While the concept of reasonableness will thus continue to play a part in determining the duration of implied warranties, the Act has given warrantors increased influence in the determination process.⁸⁸ Any modification of an implied warranty

80. Magnuson-Moss Warranty Act § 108(a), 15 U.S.C. § 2308(a), (Supp. V 1975), *quoted at* note 28 *supra*. Note also that a "supplier" becomes a "warrantor" upon making a written warranty. *Id.* § 101(4)-(5), 15 U.S.C. § 2301(4)-(5) (Supp. V 1975); 16 C.F.R. §§ 701.1(f), (g), 702.1(d), (f) (1976).

81. Magnuson-Moss Warranty Act § 108(c), 15 U.S.C. § 2308(c) (Supp. V 1975), *quoted at* note 28, *supra*.

82. See note 10 *supra* (definition of "consumer product").

83. Magnuson-Moss Warranty Act § 108(b), 15 U.S.C. § 2308(b) (Supp. V 1975), *quoted at* note 28 *supra*. This provision allows a "limited" warrantor to set the duration of implied warranties. "Full" warrantors are prohibited from doing so. *Id.* § 104(a)(2), 15 U.S.C. § 2304(a)(2) (Supp. V 1975).

84. See 11 B.C. INDUS. & COM. L. REV. 340, 343 (1970); 46 CORNELL L.Q. 607, 612 (1961). See also *Wood v. Hub Motor Co.*, 110 Ga. App. 101, 137 S.E. 2d 674 (1964) (implied warranties are effective for a reasonable time).

85. The Senate version expressly provided that the duration of an implied warranty could not be limited. S. REP. NO. 151, 93d Cong., 1st Sess. 37 (1973).

86. Magnuson-Moss Warranty Act § 108(b), 15 U.S.C. § 2308(b) (Supp. V 1975), *quoted at* note 28 *supra*. Apparently it will be up to judicial decision to identify such "reasonable" written warranties.

87. *Id.* The criteria are: the limitation must be conscionable, set forth in clear and unmistakable language, and prominently displayed on the face of the warranty. For a discussion of the unconscionability aspects of time limits on warranties, see 11 B.C. INDUS. & COM. L. REV. 340, 350 (1970).

88. It is generally assumed that implied warranties last longer and provide more protection than written warranties. This is why manufacturers traditionally disclaimed

other than a limitation of duration, however, is ineffective for purposes of the Act and state law.⁸⁹

The Act's explicit delineation of the procedure required to modify the duration of implied warranties⁹⁰ raises the issue of the viability of inconsistent state law provisions. Section 111(c) of the Act⁹¹ provides that state requirements relating to warranty labeling or disclosure which are not identical to the Act's requirements are not applicable to written warranties complying with the Act, unless prior approval has been given by the Federal Trade Commission. The Washington statute requires that any modification of the implied warranty of merchantability must specifically mention "merchantability."⁹² As the Washington provision applies to both oral and written warranties, in the context of a written warranty it could be termed a "State requirement . . . which relates to labeling or disclosure with respect to written warranties" ⁹³ Because the Washington statute is thus

implied warranties with written warranties, *see* note 79 and accompanying text *supra*, and why the language of the Act itself provides that implied warranties "may be limited in duration." *See* Magnuson-Moss Warranty Act § 108(b), 15 U.S.C. § 2308(b) (Supp. V 1975), *quoted at* note 28 *supra* (emphasis added).

Because the Act does not define "reasonable written warranty," it will be for the judiciary to determine its meaning. Unlike the U.C.C., however, the Act allows a predetermined limitation on implied warranty duration: the length of a "reasonable" written warranty. It is not likely that courts will require "reasonable" written warranties to be of the same duration as implied warranties under the U.C.C. if for no other reason than that to do so would negate the effects of the Act. That is, if a "reasonable" written warranty had to be of the same duration as an implied warranty, one can hardly be said to be limiting the duration of implied warranties.

Consequently, because it will be warrantors who determine the duration of their written warranties, the Act gives them a good deal more influence over the duration of implied warranties than do the traditional U.C.C. provisions. This will aid "limited" warrantors by providing a more definite period of exposure to breach of warranty suits, but it is submitted that consumers buying "limited warranty" products will receive implied warranty coverage of shorter duration than under the U.C.C. or a "full" written warranty, where implied warranty duration remains governed by reasonableness.

89. Magnuson-Moss Warranty Act § 108(c), 15 U.S.C. § 2308(c) (Supp. V 1975) provides: "A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title and State law."

This language may render the "course of dealing" and "trade usage" provisions of WASH. REV. CODE § 62A.2-316(3)(c), *see* note 74 *supra*, invalid in the written warranty context. Because these U.C.C. provisions are methods of disclaiming, modifying, or limiting implied warranties, and because they are not in accordance with section 108, the Act makes them ineffective where a written warranty is given.

90. *See* note 87 and accompanying text *supra*.

91. Magnuson-Moss Warranty Act § 111(c), 15 U.S.C. § 2311(c) (Supp. V 1975), *quoted at* note 29 *supra*.

92. WASH. REV. CODE § 62A.2-316(2) (1976).

93. Magnuson-Moss Warranty Act § 111(c)(1), 15 U.S.C. § 2311(c)(1) (Supp. V 1975), *quoted at* note 29 *supra*.

“not identical to” the provisions of the Act (which require no mention of merchantability), the language of section 111(c) should supersede the R.C.W. § 62A.2–316 requirements.⁹⁴ This would mean that a written “limited” warranty would not have to include the word “merchantability” when it was modifying that implied warranty.

In contrast to the above analysis is the strong statement of section 111(b)(1)⁹⁵ that nothing in the title shall invalidate any *right* or remedy of any consumer under state law. In view of R.C.W. § 62A.2–316(2), it should be argued that Washington consumers have the *right* to see the term “merchantability” when that implied warranty is being modified, and that such right is thus preserved by section 111(b)(1).

This inconsistency in the language of the Act will have to be resolved judicially, or administratively by application to the Federal Trade Commission⁹⁶ for permission to enforce the more restrictive provision.⁹⁷

IV. LIMITATION OF REMEDIES

A. *Washington Law*

The Washington U.C.C. provisions specifically provide for limitations on remedies if the requirements of R.C.W. § 62A.2–719⁹⁸ are met. That provision gives two examples of limitations of remedy: “limiting the buyer’s remedies to return of the goods and repayment of

94. Indeed, the section was included in the Act to supersede differing state provisions in order to prevent national manufacturers from having to supply different warranties for every state. See 1971 Senate Hearings, *supra* note 26, at 128 (statement of George Lamb), 136 (testimony of J. Edward Day), 174 (testimony of Alan Weber); 1973 House Hearings, *supra* note 26, at 169 (testimony of Thomas Nichol, Jr.); S. REP. NO. 151, 93d Cong., 1st Sess. 25 (1973).

95. Magnuson-Moss Warranty Act § 111(b)(1), 15 U.S.C. § 2311(b)(1) (Supp. V 1975), *quoted at* note 30 *supra*.

96. See *id.* § 111(c)(2), 15 U.S.C. § 2311(c)(2), *quoted at* note 29 *supra*.

97. For example, in July 1976, the Federal Trade Commission began a proceeding to determine the viability of certain provisions of California’s Song-Beverly Consumer Warranty Act (CAL. CIV. CODE §§ 1790–1795.5 (West 1974)). See 41 Fed. Reg. 28,361 (1976).

98.

(1) Subject to the provisions of subsections (2) and (3) of this section and of the preceding section on liquidation and limitation of damages.

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this Article and may limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the

the price or to repair and replacement of non-conforming goods or parts.”⁹⁹ In Washington, the seller is also permitted to provide that a particular remedy is the sole and exclusive remedy if the buyer so agrees.¹⁰⁰ In addition, R.C.W. § 62A.2-719(3) provides that any limitation to repair or replacement of consumer goods is invalid if the seller or manufacturer does not provide for a servicing facility within the state.¹⁰¹

B. The Magnuson-Moss Act

The Act has several remedy provisions which will add to or modify the possibilities under Washington law. These occur primarily under the “full” warranty provisions, although certain additions apply to both “full” and “limited” warranties.

Under the “full” warranty requirements, the warrantor “must as a minimum remedy such consumer product within a reasonable time and without charge”¹⁰² A warrantor cannot limit the consumer’s relief to only repair of the product because unreasonable complications will require replacement or refund.¹⁰³ Furthermore, the warrantor cannot require the consumer to accept only a refund unless

goods and repayment of the price or to repair and replacement of non-conforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy is expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, remedy may be had as provided in this Title.

(3) Limitation of consequential damages for injury to the person in the case of goods purchased primarily for personal, family or household use or of any services related thereto is invalid unless it is proved that the limitation is not unconscionable. Limitation of remedy to repair or replacement of defective parts or non-conforming goods is invalid in sales of goods primarily for personal, family or household use unless the manufacturer or seller maintains or provides within this state facilities adequate to provide reasonable and expeditious performance of repair or replacement obligations.

Limitation of other consequential damages is valid unless it is established that the limitation is unconscionable.

WASH. REV. CODE § 62A.2-719 (1976).

99. *Id.* § 62A.2-719(1)(a).

100. *Id.* § 62A.2-719(1)(b).

101. *Id.* § 62A.2-719(3).

102. Magnuson-Moss Warranty Act § 104(a)(1), 15 U.S.C. § 2304(a)(1) (Supp. V 1975). See note 14 *supra* (definition of “remedy”).

103. Magnuson-Moss Warranty Act § 101(10), 15 U.S.C. § 2301(10) (Supp. V 1975), quoted at note 14 *supra*. The “full” warranty provisions further provide that if after a reasonable number of attempts by the warrantor to remedy the product it is still defective, the warrantor must permit the consumer to elect either refund or replacement. *Id.* § 104(a)(4), 15 U.S.C. § 2304(a)(4).

repair is commercially impracticable and the warrantor is unable to provide a replacement.¹⁰⁴ Similarly, an attempt to limit the remedy only to replacement of the product would be qualified by the definition of "remedy"¹⁰⁵ and the "full" warranty requirements¹⁰⁶ should replacement become impossible.

The above Magnuson-Moss Warranty Act provisions contrast with the remedy-limiting possibilities under Washington law. While the Act incorporates the examples included in R.C.W. § 62A.2-719,¹⁰⁷ it apparently disallows a limitation to just one of them. This will make R.C.W. § 62A.2-719(1)(b),¹⁰⁸ which allows for an *exclusive* remedy, ineffective for purposes of a "full" written warranty.¹⁰⁹

The Act creates some remedies which are applicable to either "full" or "limited" warranties irrespective of state law.¹¹⁰ If a consumer prevails in a breach of warranty action, the judgment may include costs,

104. Magnuson-Moss Warranty Act § 101(10), 15 U.S.C. § 2301(10) (Supp. V 1975), *quoted at* note 14 *supra*. Prior to the sale of a consumer product, it might be determined by the manufacturer that the repair of such product would be commercially impracticable. A sponge warranted for a year would be an example of commercial impracticability of repair.

A "one-of-a-kind" item or a manufacturer's last stock of a product might create the situation where the manufacturer knows in advance that replacement would not be possible. "Replacement" is defined, however, as "furnishing a new consumer product which is identical or *reasonably equivalent* to the warranted consumer product." *Id.* § 101(11), 15 U.S.C. § 2301(11) (emphasis added). Thus only rarely would it be possible to limit the remedy in advance of sale to only a refund.

105. *Id.* § 101(10), 15 U.S.C. 2301(10) (Supp. V 1975), *quoted at* note 14 *supra*.

106. Although the Act does not clearly prevent the exclusive limitation of "replacement," section 104(a)(4) provides that a "full" warrantor is only given a *reasonable* number of attempts to "remedy" defects. Magnuson-Moss Warranty Act § 104(a)(4), 15 U.S.C. § 2304(a)(4) (Supp. V 1975). Because the term "remedy" includes repair, refund, and *replacement*, the result is that replacement could not be made the exclusive remedy unless it was known in advance that it could be accomplished in a "reasonable" period of time and manner.

107. *See* note 98 *supra*. The examples are return of goods for refund and replacement of non-conforming goods.

108. *See* note 98 *supra*.

109. The "limited" warranty provisions of the Act place no requirement on a warrantor to "remedy" a consumer product. *See* Magnuson-Moss Warranty Act §§ 102, 103(a)(2), 15 U.S.C. §§ 2302, 2303(a)(2) (Supp. V 1975), *quoted at* notes 8 & 11 *supra*. Instead, pursuant to the disclosure provisions of section 102, *id.* § 102, 15 U.S.C. § 2302, *quoted at* note 8 *supra*, and the implementing rule thereunder, 16 C.F.R. § 701.3 (1976), *quoted at* note 9 *supra*, the only requirement of a "limited" warrantor regarding limitation of remedy is to fairly disclose how he or she is limiting the consumer's remedy for breach of warranty.

110. Both the "limited" and "full" warrantor are, however, still subject to Washington's "service facility" provision. *See* WASH. REV. CODE § 62A.2-719(3) (1976), *quoted at* note 98 *supra*. This is because the Act preserves a consumer's right or remedy under state law. Magnuson-Moss Warranty Act § 111(b)(1), 15 U.S.C. § 2311(b)(1) (Supp. V 1975), *quoted at* note 30 *supra*. The implementing rule also demonstrates the Act's lack of interference with state limitation of remedy provisions: "[Any war-

expenses, and reasonable attorney's fees.¹¹¹ No warrantor can preclude the remedy provided by this explicit language of the Act. A further limitation on a warrantor's ability to exclude remedies occurs if the warrantor chooses to establish an informal dispute settlement mechanism under section 110 and incorporate it into the warranty. Presumably the warrantor and the consumer are then required to resort to it.¹¹²

V. LIMITATION ON CONSEQUENTIAL DAMAGES

A. Washington Law

The Washington provision on limitation of consequential damages is R.C.W. § 62A.2-719(3),¹¹³ which provides that any limitation of consequential damages for personal injury in the consumer product setting is *invalid* unless proved *conscionable*. Other limitations of consequential damages are *valid* unless proved *unconscionable*.¹¹⁴ The Washington statute makes no specific requirement to disclose or label a limitation on consequential damages, such areas presumably being governed by the concept of unconscionability. In a recent decision,¹¹⁵ the Washington Supreme Court discussed the concept of unconscionability in commercial transactions, and held that the "conspicuousness"

rantor shall disclose] (8) [a]ny exclusions of or limitations on relief such as incidental or consequential damages, accompanied by the following statement . . . : Some states do not allow the exclusion or limitation of incidental or consequential damages, so the above limitation or exclusion may not apply to you." 16 C.F.R. § 701.3(8) (1976).

111. Magnuson-Moss Warranty Act § 110(d)(2), 15 U.S.C. § 2310(d)(2) (Supp. V 1975) provides:

If a consumer finally prevails in any action brought under paragraph (1) of this subsection, he may be allowed by the court to recover as part of the judgment a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action, unless the court in its discretion shall determine that such an award of attorneys' fees would be inappropriate.

112. *Id.* § 110(a)(3)(i), 15 U.S.C. § 2310(a)(3)(i) (Supp. V 1975). Some question might be raised as to the ability of the warrantor to avoid use of this procedure even when established, however, because the implementing rule at 16 C.F.R. § 703.5(j) (1976) provides that decisions of the settlement mechanism are not legally binding on any person. See also *Magnuson-Moss Statements*, *supra* note 2, at 60,190. (further details on the procedure).

113. WASH. REV. CODE § 62A.2-719(3) (1976), quoted at note 98 *supra*.

114. *Id.*

115. *Schroeder v. Fageol Motors*, 86 Wn. 2d 256, 544 P.2d 20 (1975).

of damage limitation provisions was a relevant factor in determining unconscionability.¹¹⁶ As discussed below, this requirement of conspicuousness is significant when considering the Magnuson-Moss Act's effects on Washington's consequential damage provisions.

B. *The Act's Provisions on Consequential Damages*

Certain language of the Act could give the impression that a warrantor need only meet state requirements to properly limit consequential damages.¹¹⁷ The provisions of the Act, however, do add to state law, and a Washington warrantor cannot rely entirely on state provisions in attempting to limit consequential damages where a written warranty is given.

Section 104(a)(3), governing "full" warranty standards, allows a limitation on consequential damages *only* if such limitation appears conspicuously on the face of the warranty.¹¹⁸ In addition, although the general disclosure requirements of section 102,¹¹⁹ covering both "full" and "limited" warranties, contain no specific references to conspicuous disclosure of damage limitations, the implementing rule for that section clearly requires disclosure in a conspicuous manner, and in addition requires a caveat that some states may not allow such provisions.¹²⁰

Thus, both the Act and the implementing rule contain a disclosure requirement not included in the Washington U.C.C. provision, with the result that a written warrantor in Washington must prominently

116. Although *Schroeder* involved a purely commercial as opposed to consumer transaction, the court relied upon and approved the public policy behind two consumer cases: *Berg v. Stromme*, 79 Wn. 2d 184, 484 P.2d 380 (1971), *see* notes 75-78 and accompanying text *supra*, and *Baker v. Seattle*, 79 Wn. 2d 198, 484 P.2d 405 (1971). *Baker* held that a limitation of consequential damages must be conspicuous. Implicit in the *Schroeder* court's application of the conspicuousness requirement to a commercial transaction was that it is also an important factor in determining unconscionability in the consumer setting.

117. Magnuson-Moss Warranty Act § 111(b)(2), 15 U.S.C. § 2311(b)(2) (Supp. V 1975) provides:

Nothing in this chapter (other than sections 2308 and 2304 (a) (2) and (4)) shall (A) affect the liability of, or impose liability on, any person for personal injury, or (B) supersede any provision of State law regarding consequential damages for injury to the person or other injury.

118. "[S]uch warrantor may not exclude or limit consequential damages for breach of any written or implied warranty on such product, unless such exclusion or limitation conspicuously appears on the face of the warranty." *Id.* § 104(a)(3), 15 U.S.C. § 2304(a)(3).

119. *Id.* § 102, 15 U.S.C. § 2302, *quoted at* note 8 *supra*.

120. 16 C.F.R. § 701.3(a)(8) (1976), *quoted at* note 9 *supra*.

disclose the details of any limitation of consequential damages on the face of the warranty.¹²¹ This requirement of conspicuous disclosure is of additional importance to Washington warrantors. Because conspicuousness is apparently a significant factor in avoiding an unconscionable limitation of damages,¹²² a warrantor who meets the requirements of the Act also satisfies an element in the determination of conscionability.¹²³ Furthermore, the provisions of the Act and implementing rules requiring availability of written warranty terms prior to sale will add to the conspicuousness of warranty provisions, as well as make them common knowledge.¹²⁴

VI. A NEW CAUSE OF ACTION

Because a consumer desiring to sue for breach of warranty is not required to bring his or her action under the Act, the conventional Washington statutory provisions remain to enforce such obligations.¹²⁵ More significant, however, are the new opportunities for consumer redress provided by the Act. Section 110(d)(1) provides that a consumer may sue in either state or federal court for a warrantor's failure to meet the obligations of the Act under a service contract, written warranty, or implied warranty.¹²⁶ Perhaps most significant is the cause of action for breach of *implied* warranty which may now be

121. See Magnuson-Moss Warranty Act § 104(a)(3), 15 U.S.C. § 2304(a)(3) (Supp. V 1975), *quoted at* note 118 *supra*; 16 C.F.R. § 701.3(a)(8) (1976), *quoted at* note 9 *supra*.

122. See notes 114–16 and accompanying text *supra*.

123. The implementing rule, however, requires that a long list of items be conspicuously disclosed in a single document. Perhaps no single item in such a list would be conspicuous to the Washington courts. See 16 C.F.R. § 701.3 (1976), *quoted at* note 9 *supra*.

124. See Magnuson-Moss Warranty Act § 102(b)(1)(A), 15 U.S.C. § 2302(b)(1)(A) (Supp. V 1975); 16 C.F.R. § 702 (1976). This rule requires sellers to make warranties available for consumer inspection prior to sale. For example, warranties must be available next to the product, in a binder near the product, or on the product package.

125. See Magnuson-Moss Warranty Act § 111(b)(1), 15 U.S.C. 2311(b)(1) (Supp. V 1975), *quoted at* note 30 *supra*. It should also be remembered that a seller is not required by the Act to give a written warranty. *Id.* § 102(b)(2), 15 U.S.C. § 2302(b)(2).

126. *Id.* § 110(d)(1), 15 U.S.C. § 2310(d)(1) (Supp. V 1975) provides:

Subject to subsections (a)(3) and (e) of this section, a consumer who is damaged by the failure of a supplier, warrantor, or service contractor to comply with any obligation under this chapter, or under a written warranty, implied warranty, or service contract, may bring suit for damages and other legal and equitable relief—

brought under the federal act. Although other language of the Act¹²⁷ and implementing rules¹²⁸ raises some doubt as to this cause of action, the legislative history of the bill demonstrates an intent to allow recovery for such a breach.¹²⁹ The Act also provides for recovery of attorney's fees and costs by successful plaintiffs in such actions.¹³⁰ These provisions expand consumers' possibilities for recovery beyond those provided by the conventional U.C.C. provisions.¹³¹

Although the creation of a federal cause of action and the potential recovery of attorney's fees and costs may not comport with the common conception of the Act, it is suggested that these provisions will increase implied warranty litigation in Washington, as suits previously not economically feasible for plaintiffs will now be so.

(A) in any court of competent jurisdiction in any State or the District of Columbia; or

(B) in an appropriate district court of the United States, subject to paragraph (3) of this subsection.

The Act was, however, intended to be enforced primarily in state courts. See H.R. REP. NO. 1107, 93d Cong., 2d Sess. 42 (1974) reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7702, 7723-24; S. REP. NO. 151, 93d Cong., 1st Sess. 23 (1973). Note also that the minimum jurisdictional amount for a suit in a federal district court is \$50,000. Magnuson-Moss Warranty Act § 110(d)(3), 15 U.S.C. § 2310(d)(3) (Supp. V 1975).

127. Magnuson-Moss Warranty Act § 110(f), 15 U.S.C. § 2310(f) (Supp. V 1975) provides: "For purposes of this section, only the warrantor actually making a written affirmation of fact, promise, or undertaking shall be deemed to have created a written warranty, and any rights arising thereunder may be enforced under this section only against such warrantor and no other person."

128. The implementing rules for disclosure of terms and presale availability of warranties define "warrantor" as "any supplier or other person who gives or offers to give a written warranty," deleting the Act's additional language of "or who is or may be obligated under an implied warranty." See 16 C.F.R. §§ 701.1(g), 702.1(d) (1976); Magnuson-Moss Warranty Act § 101(5), 15 U.S.C. § 2301(5) (Supp. V 1975).

129. As to the Act's language in section 110(f), quoted at note 127 *supra*, the legislative history indicates that the purpose of that section was to protect manufacturers from liability on seller's inconsistent warranties. See note 69 *supra*.

As to the implementing rules, note 128 *supra*, the intent of the FTC in deleting the implied warranty language of the definition of "warrantor" is unclear. The Commission may have intended to prevent all suits based only on implied warranties, but it is preferable to assume that the Commission meant that one could not sue a warrantor for failure to comply with the Act's disclosure and labeling provisions when the warrantor's failure to comply is based entirely upon his implied warranty obligation. Note the distinction between this situation and a suit under the Act for breach of implied warranty including attorney's fees and costs. See also Magnuson-Moss Statements, *supra* note 2, at 60.170 (FTC states that the changes in the Act's definitions are "[f]or the purposes of these [labeling and disclosure] rules.").

130. Magnuson-Moss Warranty Act § 110(d)(2), 15 U.S.C. § 2310(d)(2) (Supp. V 1975), quoted at note 111 *supra*.

131. See also *id.* § 110(b)-(c), 15 U.S.C. § 2310(b)-(c) (violation of the Act constitutes violation of Federal Trade Commission Act enforceable by the Attorney General or the FTC).

VII. CONCLUSION

The Magnuson-Moss Warranty Act is a detailed and technical piece of legislation and it will be some time before sellers, buyers, their representatives, and the Federal Trade Commission master its provisions. The problems and ambiguities discussed herein are representative of those throughout the Act, and while the implementing rules and policy statements of the Federal Trade Commission are a necessary step in the full utilization of the Act, further clarification is necessary.

In addition to greater exposure to liability by not meeting the specific provisions of the Act, sellers will likely suffer a greater number of suits by plaintiffs now allowed to recover attorney's fees and costs. Through the increased disclosure and labeling requirements, however, advantages will accrue to Washington warrantors, including the possibility of national standardization of warranty documents, and a "ready-made" defense to actions based upon inconspicuousness of warranty terms and conditions.

The extensive written warranty requirements may prove to be an increased burden, not only to warrantors but to consumers as well. The necessity of sifting through a detailed warranty document prior to sale, and attempting to decipher the Act's terms of art may actually decrease "warranty shopping" rather than increase it.¹³²

Nevertheless, additional warranty information should now be available to those willing to study it, and Washington consumers should be better off than under the U.C.C. provisions previously governing warranty documents. Although potentially weakened by the ability of "limited" warrantors to limit the duration of implied warranties,¹³³ perhaps the most significant effect of the Act is to overcome those U.C.C. provisions which allow sellers who give written warranties to disclaim the implied warranties arising by operation of law. In contrast to the detailed, conflicting, and ambiguous aspects of the Magnuson-Moss Warranty Act, this prohibition may well prove to be its saving grace.

Guy Towle

132. As an example of the potential confusion created by the Act, note the following heading on a warranty offered by a Seattle merchant—a heading which is probably within the letter of the law, albeit not within the spirit: "100% UNCONDITIONALLY GUARANTEED GOLD SEAL LIMITED WARRANTY." Document on file at the offices of *Washington Law Review*.

133. See notes 83–88 and text accompanying *supra*.